(55892)

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1353

IRA S. BUSHEY & SONS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CKRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. A, 1a-28a) is reported at 363 F. Supp. 110. The court of appeals affirmed without an opinion (Pet. App. C, 30a-31a).

JURISDICTION

The judgment of the court of appeals was entered on December 7, 1973 (Pet. App. C, 30a-31a). Petitions for rehearing and for rehearing *en banc* were denied on February 6, 1974 (Pet. App. D, 32a-34a). The petition for a writ of certiorari was filed on March 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether federal administrative regulation of oil carrying vessels precluded specific equitable relief designed to prevent oil spills on Lake Champlain.

STATUTES INVOLVED

The relevant statutes are set forth at Pet. App. F, 35a-46a.

STATEMENT

Petitioners[1] are in the oil transport business and own approximately 25 vessels which are capable of operating in the Vermont waters of Lake Champlain. On September 13, 1971, after petitioners' vessels had been involved in a number of oil spills in those waters, the United States instituted this action seeking equitable relief for violations of Section 13 of the Rivers and Harbors Act of 1899, 30 Stat. 1152, 33 U.S.C. 407 ("The Refuse Act").[2]

In a non-jury trial, the district court found that between April 30, 1967 and November 6, 1972, petitioners' vessels were involved in nine incidents, several attributable to their negligence, which resulted in the spillage of over 33,000 gallons of petroleum products into the waters of Lake Champlain (Pet. App. A, 5a-12a). The various spills caused, among other things, the closing of Shelburne Harbor for a day because of fire hazard, the sealing of spill areas from Lake traffic, the death of wildlife, the fouling of a beach, and presented a substantial risk of damage to the water supply of the City of Burlington, which relies wholly on Lake Champlain water (Pet. App. A, 5a-15a). Based upon these findings, the district court

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[1]Ira S. Bushey & Sons, Inc., wholly owns Spentonbush Transport Service, Inc., and Tanker Hygrade No. 8, Inc.

[2]Two of the defendants, Northern Oil Company, Inc. and Northern Terminals, Inc., entered into a consent judgment on April 23, 1973.

held that petitioners had violated 33 U.S.C. 407 and the federal common law of nuisance. The court rejected petitioner's contention that Congress had pre-empted the field of regulation of oil-carrying vessels so as to preclude equitable relief and ordered a series of injunctive measures designed to prevent or lessen the danger of oil spills from petitioners' vessels (Pet. App. A.25a-28a). The court of appeals affirmed without opinion (Pet. App. C, 30a-31a).

ARGUMENT

Petitioners contend that the lower court erred in granting equitable relief pursuant to the Refuse Act and the federal common law of nuisance because other federal statutes and regulations, primarily the Federal Water Pollution Control Act of 1948 as amended,[3] regulations issued by the Coast Guard under authority of that Act, and the Ports and Waterways Safety Act of 1972, 86 Stat. 424, 427, 46 U.S.C. (Supp. II) 391a, *et seq.* preempt other relief. This contention is incorrect.

1. The Refuse Act fully supports the equitable relief granted by the district court. The Act proscribes the discharge or deposit from any ship, barge or floating craft of any refuse matter of any kind. It has been established that the Act applies to the spillage of oil, *United States* v. *Standard Oil Co.* 384 U.S. 224, and

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[3]62 Stat. 1155, 46 U.S.C. 466, *et. seq.*, as amended, Act of July 17, 1952, 66 Stat. 755; Water Pollution Control Act Amendments of 1956, 70 Stat. 498; Federal Water Pollution Control Act Amendments of 1961, 75 Stat. 204; Water Quality Act of 1965, 79 Stat. 903; Clean Water Restoration Act of 1966, 80 Stat. 1246; Water Quality Improvement Act of 1970, 84 Stat. 91, 33 U.S.C 1151, *et seq.*; Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C (Supp. II) 1251, *et seq.*

that injunctive relief is appropriate. *United States* v. *Republic Steel Corp.*, 362 U.S. 482; *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191; *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F. 2d 81, 88 (C.A. 2).

The Refuse Act has not been repealed by the Federal Water Pollution Control Act or the Ports and Waterways Safety Act. To the contrary, remedies under the Refuse Act are specifically preserved by the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. II) 1371(a); 33 U.S.C. (Supp. II) 1321(o)(3). *United States* v. *Pennsylvania Chemical Corporation*, 411 U.S. 655, 668. And there is no evidence in the Ports and Waterways Safety Act of 1972, 46 U.S.C. (Supp. II) 391a, *et seq.* or the legislative history of the Act, that repeal of other applicable acts was intended by Congress. Cf. *Asken* v. *American Waterways Operators, Inc.*, 411 U.S. 325. Moreover, although the Ports and Waterways Act does grant broad powers to the Coast Guard to issue regulations for protection of the marine environment, the power is permissive and not mandatory. 46 U.S.C. 391a(4). To date, no regulations dealing with preservation of the marine environment have been issued pursuant to that Act.

In *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 104, this Court held that "[t]he application of federal common law to abate a public nuisance in interstate or navigable waters is not inconsistent with the Water Pollution Control Act." The Court further stated, 406 U.S. at 107:

> [N]ew federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that time comes to pass, federal

> courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. * * *

It is clear, therefore, that the mere fact that the Coast Guard possesses unexercised power under the Ports and Waterways Act to issue regulations does not preclude judicial action now to ameliorate petitioner's interference with the public's right to the enjoyment of unpolluted water in Lake Champlain.

2. Although the Coast Guard has not issued regulations pursuant to the Ports and Waterways Act, it has issued regulations for protection of the marine environment pursuant to the Federal Water Pollution Control Act. That Act, however, as mentioned above, specifically preserves the additional remedies at issue here. Moreover, there is no conflict between the lower court's order and the Coast Guard regulations. In some instances the court merely advanced the effective date of the regulations from July 1, 1974 to the start of the 1974 shipping season on Lake Champlain. The court did this, for example, with those Coast Guard regulations requiring a pre-transfer conference (33 C.F.R. 156.120(q); Pet. App. A, 26a); a voice communication system between the vessel commander and the terminal operator (33 C.F.R. 154.560; Pet. App. A, 26a-27a), and a certified tankerman in charge of oil transfer operations (33 C.F.R. 155.710(a)(1); Pet. App. A, 26a). In other instances the court acted interstitially to supplement the Coast Guard provisions. For example, the Coast Guard requirement that self-propelled vessels be equipped with deck lights of five foot-candle power for nighttime operations (33 C.F.R. 155.790) was extended by the court to non-self-propelled vessels (Pet. App. A, 26a). The Coast Guard mandate that a contingency plan

be formulated for reporting and containing oil discharges (33 C.F.R. 154.310(p)) was adopted by the court, but in light of the specific history of oil spills here, with the added proviso that the plan be subject to the approval of the Regional Administrator of the Environmental Protection Agency in Boston (Pet. App. A, 27a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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